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Constitutional battle brews over newsletter license

By J.H. Doyle
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A federal courtroom in Alexandria is set to come alive today with talk of Thomas Paine, fraud in the marketplace and freedom of the press.

The Securities and Exchange Commission has asked the court to halt the publication of "Investment Intelligence," a financial and political newsletter with approximately 32,000 subscribers, until it registers with the SEC as an "investment adviser."

The newsletter's publishers, the Center for Strategic Investing, based in Woodbridge, Va., insist on the right to publish freely under the First Amendment — without a government license.

SEC officials view registration as a means to fight fraud in the securities industry, and insist that these publishers serve in a professional capacity — like doctors and lawyers — thus falling under the government's licensing authority.

The trial begins this morning in U.S. District Court. Each side is expected to present a number of witnesses including leading constitutional law scholars and former members of the intelligence community.

Brian W. Smith, a co-owner of Investment Intelligence, also is a partner in KCI Publications, an Arlington-based company that is one of the nation's largest newsletter publishers.

The U.S. Supreme Court, which agreed earlier this month to hear a similar case involving Christopher L. Lowe, a New York-based newsletter publisher, has elevated this controversy between federal regulators and financial newsletter publishers to one of this year's hottest constitutional issues.

In a pre-trial memorandum filed yesterday, lawyers for Investment Intelligence claim that any licensing decision on who may publish financial information is "discriminatory" and that "to silence the press through such a prior restraint is unconstitutional."

The memorandum contends that Investment Intelligence's political and economic content is protected as "core" First Amendment expression.

"Investment Intelligence takes positions on the vital issues of the day and is often ideological in tone and content, inveighing against Marxism, the size of the federal deficit, 'Big Government' and the inflationary actions of the Federal Reserve System," the court memo states.

The newsletter also presents information on investments in securities, coins, precious metals, diamonds and real estate.

It would be "incongruous" to deny constitutional protections to the financial community "while First Amendment protections are available to abortion advertisements, sacrilegious films and the publication of state secrets," the memo states.

The SEC has accused the publishers of failing to register their newsletter under the Investment Advisers Act of 1940, as well as violating the agency's anti-fraud provisions.

Any publication that is paid to give specific investment advice on publicly traded companies, in person or in print, must register with the SEC, the law states, except for "bona fide" news organizations.

"Who's to draw the line between a newspaper and a newsletter?" asks attorney John M. Liftin, who represents the publishers. "Does format make the difference? Does the fact you sell it on the street make the difference?

"If you pick up an issue of Investment Intelligence you find as much commentary on world events as on individual investments," he says.

The SEC also has accused Investment Intelligence of using fictitious names of advisory board members listed as former military, State Department and CIA

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Photo by Walter Oates-The Washington Times

Brian W. Smith is co-owner of Investment Intelligence whose owners appear today in court to fight an SEC request to stop printing until the newsletter is registered.

officers to advertise its publication to some 1.6 million people.

Those were pen names, the publishers claim, which were used for actual board members including Gen. Walter Walker, who served as NATO commander-in-chief of allied forces in Northern Europe.

The publishers also overstated the newsletter's non-existent track record and "misrepresented" that the Center for Strategic Investing had been in business for two years, the SEC alleged.

Financial newsletter publishers across the nation — responding to a recent SEC crackdown on non-registered publications — have rallied behind Investment Intelligence's decision to contest the SEC allegations.

"I've had a running battle with the SEC since day one," says James Dines, editor of The Dines Letter.

"And I'm outraged that any part of the financial press is regulated. There are specific prohibitions in the Constitution against it.

"I take an adamant and uncompromising view," he says. "There should be no regulation of the press."

There are roughly 400 to 500 financial newsletters. Publishers acknowledge that the industry relies on direct mail advertising and must use "hard sell" methods to sell subscriptions.

Newsletter publishers say they have brought new ideas to the investor and claim they were the first to back investments in gold and other metals, as well as to pursue "technical analysis" of trends in the securities industry.

"It's utterly outrageous that this section of the press has to get a license to publish," says Howard Ruff, the Utah-based owner of the nation's largest financial newsletter. "Especially when you consider that The Wall Street Journal, Forbes, Fortune and Business Week give as specific investment advice as those other [financial newsletter] publications."

Mr. Ruff says the industry should be self-regulated through a "tough code of ethics."

"We are political gadflies, the pamphleteers of the 20th century, the Thomas Paines," he says. "We're the ones that view with alarm and have pointed out the economic sins of our time. ... What if Thomas Paine had to register with King George to be printed."

But not all financial newsletter publishers accept this view and some welcome SEC regulation.

"Naturally, we all agree with freedom of speech," says Joe Granville of Kansas City, Mo., who has published his often controversial Granville Market Letter since 1963.

"But when it comes to writings that affect people's personal finances, you have to have a cop on the block, or any Harry can come out with a newsletter and the public doesn't know who's legitimate.

"It's a dangerous time for a neophyte to come into the stock market," he says. "The SEC registered five hundred new letters in 1983.... [But] the death rate of these letters is 30 to 50 percent in the first two years or less."

And when newsletters fail, he says, they take their investors down with them.